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BEFORE
THE PUBLIC SERVICE COMMISSION
OF SOUTH CAROLINA

ORIGINAL

In the Matter of Consideration of Regulations Regarding the Designation of Eligible Telecommunications Carriers	)))	**2006-37-C**

COMMENTS OF HARGRAY WIRELESS, LLC

Hargray Wireless, LLC ("Hargray"), by its counsel, hereby submits these Comments in response to Notice of Drafting filed May 9, 2006, in the above-captioned matter.

I. Introduction

Hargray welcomes this opportunity to respond to the Notice of Drafting seeking comment on the development of appropriate criteria and standards for eligible telecommunications carrier ("ETC") designations and recertifications in South Carolina, including FCC's recent *ETC Report and Order*[1] and the extent to which they should be adopted in South Carolina. In deciding whether to adopt any of the FCC's guidelines, Hargray encourages the Commission to follow the FCC's attempt to balance the need to promote universal service and competition, consistent with the 1996 Act and the FCC's policy over the past nine years. The FCC has properly interpreted the promotion of universal service and competition as dual goals which must be pursued equally, rejecting proposals to adopt rules that favor one class of carrier over another as presenting "a false choice between competition and universal service."[2] Alongside the universal service

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[1] *Federal-State Joint Board on Universal Service,* CC Docket No. 96-45, FCC 05-46, *Report and Order* (rel. March 17, 2005) ("*ETC Report and Order*").

[2] *Federal-State Joint Bd. on Universal Service, Report and Order,* 12 FCC Rcd 8776, 8802-03 (1997), *aff'd in part, rev'd in part sub nom. Texas Office of Pub. Util. Counsel v. FCC,* 183 F.3d 393 (5th Cir. 1999), *cert denied,* 530 U.S. 1210, 1223 (2000), *and cert. dismissed,* 531 U.S. 975 (2000) ("*First Report and Order*").

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mandate is the directive that local telephone markets be opened to competition.[3] The Commission must see to it that *both* universal service *and* local competition are realized; one cannot be sacrificed in favor of the other.[4] Any set of ETC designation and certification criteria must promote these dual objectives.

Hargray also encourages the Commission to fulfill the fundamental mandate of the 1996 Act: to lower regulatory burdens for all carriers by encouraging competitive entry throughout the state so that consumers can begin to have the benefits of competition – lower prices, new services, health and safety benefits, economic development opportunities, and the ability to change service providers, so as to drive carriers to improve their offerings.[5]

II. Currently Pending ETC Petitions Should Not Be Held Up By This Proceeding.

Hargray understands that this docketed matter was commenced in response to a request by the Office of Regulatory Staff that the Commission hold in abeyance the Application for ETC designation filed by Budget Phone, Inc.[6] Specifically, ORS argued that "without the establishment of a standard set of guidelines for ETC designation, determinations will be made on a case-by-case basis and will not be competitively neutral."[7]

Hargray agrees with ORS that it is critical to have a set of competitively neutral ETC criteria applicable to all ETCs and ETC applicants. However, competitive neutrality also

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[3] *See* Joint Explanatory Statement of the Committee of Conference, H.R. Conf. Rep. No. 458, 104th Cong., 2d Sess. at 113 (declaring the purpose of the 1996 Act "to provide for a pro-competitive, de-regulatory national policy framework" aimed at fostering rapid deployment of telecommunications services to all Americans "by opening all telecommunications markets to competition. . . .").

[4] *Alenco, et al. v. FCC,* 201 F.3d 608, 615 (5th Cir. 2000) (citations omitted).

[5] *See* Telecommunications Act of 1996 (Preamble), Pub.L.No. 104-104, 110 Stat. 56 (1996).

[6] Motion to Hold Petition in Abeyance, Docket No. 2005-219-C (filed Jan. 9, 2006).

[7] *Id* at p. 4.

demands that petitions for ETC designation be processed without undue delay so that consumers in rural areas can experience the benefits intended by Congress. Recognizing this fact, several other states – including Alaska, Arizona, Iowa, Kansas, Kentucky, Maine, Minnesota, Mississippi, New Mexico, North Dakota, Oregon, South Dakota, Vermont, Washington, West Virginia, and Wisconsin – have processed ETC petitions while new or modified designation and reporting requirements were still under consideration, or in the absence of a rulemaking altogether. Indeed, the FCC made several competitive ETC designations during the pendency of the proceeding that led to the March 17, 2005, *ETC Report and Order*[8] referenced by ORS.[9]

Because the FCC and numerous states did not wait until new rules were adopted before processing ETC petitions, Hargray submits there is no reason to hold up such petitions in South Carolina. Hargray's own Application has been pending since July 2003. Rather than subject ETC applicants and rural consumers to further delay, Hargray submits that the better approach is to process ETC applications expeditiously by following the FCC's permissive guidelines from the *ETC Report and Order*. Hargray has encouraged this Commission to adopt this approach in recently amending its Application to set forth its commitment and capability to meet the FCC's guidelines. In the absence of final rules adopted by this Commission, carriers should be designated as ETCs if they can meet the FCC's guidelines. Once this rulemaking is complete, any new rules will apply to all ETCs, including those designated under the criteria articulated in the FCC's guidelines.

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[8] *Federal-State Joint Board on Universal Service, Report and Order*, 20 FCC Rcd 6371 (2005).

[9] *See, e.g., Public Service Cellular*, 20 FCC Rcd 6854, 6859 (rel. Jan. 31, 2005) ("*Public Service Cellular*"); *Sprint Corp.*, 19 FCC Rcd 22663, 22667 (2004) ("*Sprint ETC Order*"); *Advantage Cellular Systems, Inc.*, 19 FCC Rcd 20985, 20992-93 (2004) ("*Advantage Tennessee Order*"); *Highland Cellular, Inc.*, 19 FCC Rcd 6422, 6432-33 (2004) ("*Highland Cellular*"); *Virginia Cellular, LLC*, 19 FCC Rcd 1563, 1575-76 (2004) ("*Virginia Cellular*").

III. The Commission Should Follow the FCC's Suggestion to Apply Any New Reporting Requirements to Incumbent LECs, Not Just Competitive ETCs.

Hargray urges the Commission to consider whether any new requirements resulting from this proceeding should apply to previously designated ETCs, not just future competitive ETC applicants. We note that the FCC encouraged state commissions to apply any new compliance conditions and reporting requirements they adopt "to all ETCs, not just competitive ETCs."[10] We submit, therefore, that any rules adopted in this proceeding should be applicable to all ETCs.

Although the FCC emphasized the adoption of requirements for both incumbents and competitive ETCs, the permissive guidelines adopted in the *ETC Report and Order* were set up specifically for competitive ETCs because the FCC does not designate ILECs as ETCs or certify their use of high-cost support. Thus, adopting the FCC's rules wholesale may not fully take into account differences in technology. In considering the guidelines for ILECs and competitive ETCs, Hargray requests that the Commission take into account that the FCC did not have an opportunity to impose a regulatory scheme for ILECs.

IV. The Commission Should Proceed Cautiously in Adopting Any New Requirements.

It is important to note that the *ETC Report and Order* did not create any additional state authority to adopt service quality or other regulations. This Commission has always had the authority to determine whether various forms of regulation are appropriate, and it has acted pursuant to that authority with respect to Hargray and other carriers in South Carolina. Moreover, the Commission remains subject to the same limits on its rulemaking authority prescribed by federal statute, including the preemptive provisions of Sections 253 and 332(c)(3) of the Act. Absent a compelling need, the preference should be for less regulation, not more. Therefore,

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[10] *ETC Report and Order*, at para. 71.

Hargray urges the Commission to proceed with caution in deciding whether any additional regulation is appropriate for South Carolina carriers and their subscribers.

The guidelines established in the *ETC Report and Order*, do not represent a "floor" or "baseline" level of regulation that states are invited to exceed. Rather, the FCC encouraged states to require carriers "to meet the same conditions and to conduct the same public interest analysis outlined in this Report and Order."[11] In fact, the FCC emphasized that states should not impose new requirements on competitors unless such requirements are "necessary to further universal service goals."[12] The FCC also cautioned states against imposing wireline-style regulation on competitors by fiat, agreeing with the Joint Board's recommendation that "states should not require regulatory parity for parity's sake."[13]

Under its exclusive ETC designation authority found in 47 U.S.C. § 214(e)(2), this Commission is well within its rights to consider whether any or all of the permissive guidelines adopted by the FCC are a poor fit for South Carolina. Indeed, the FCC acknowledged that:

> [S]ection 214(e)(2) demonstrates Congress's intent that state commissions evaluate local factual situations in ETC cases and exercise discretion in reaching their conclusions regarding the public interest, convenience and necessity, as long as such determinations are consistent with federal and other state law. . . . Furthermore, state commissions, as the entities most familiar with the service area for which ETC designation is sought, are particularly well-equipped to determine their own ETC eligibility requirements.[14]

Accordingly, rather than treat the permissive guidelines as "minimum" requirements, this Commission should consider whether each guideline proposed by the FCC is appropriate for all

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[11] *ETC Report and Order*, at para. 58.

[12] *Id.* at para. 30

[13] *Id., citing Federal-State Joint Board on Universal Service, Recommended Decision,* 19 FCC Rcd 4257, 4271, para. 34 (2004).

[14] *Id.* at para. 61.

ETCs in South Carolina and how a competitively neutral regulatory structure can be developed.

Some have argued that there should be a "level playing field" for all ETCs. Hargray could not agree more. However, a level playing field does not mean that all ETCs should be regulated as ILECs. Competitive neutrality and regulatory parity are two entirely different concepts that must not be confused. Congress and the FCC have refrained from imposing ILEC regulation on competitive ETCs for a very important reason: competitive carriers are already constrained by market forces to win and keep customers by providing high-quality, affordable service.[15] That is, universal service rules may be competitively neutral, even though the overall regulatory burden is not, simply because one class of carrier bears a greater regulatory burden due to its historical monopoly status. It makes no sense to impose ILEC-style regulations on competitors that are already subjected to the rigors of a free market that requires them to provide a high level of service or lose customers to a rival provider.

If competitive markets can be encouraged in rural areas, then the level of regulation on all carriers, including ILECs, can be incrementally lowered. All carriers should have the minimum amount of regulation needed to achieve the goal of ensuring that consumers throughout the state have both universal service and competition. The playing field today is not level because competitors like Hargray have not historically had the access to the low-cost (or no-cost) REA/RUS loans and federal universal service subsidies that ILECs have enjoyed for decades, and therefore do not have extensive networks to compete in much of rural South

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[15] *See First Report and Order, supra,* 12 FCC Rcd at 8857-58 ("Several ILECs assert that the Joint Board's recommendation not to impose additional criteria is in conflict with its recommended principle of competitive neutrality because some carriers, such as those subject to COLR obligations or service quality regulation, perform more burdensome and costly functions than other carriers that are eligible for the same amount of compensation. The statute itself, however, imposes obligations on ILECs that are greater than those imposed on other carriers, yet section 254 does not limit eligible telecommunications carrier designation only to those carriers that assume the responsibilities of ILECs.")(footnotes omitted).

Carolina. The FCC has found these conditions to be one of the biggest reasons for distributing support to CETCs:

> The present universal service system is incompatible with the statutory mandate to introduce efficient competition into local markets, because the current system distorts competition in those markets. For example, without universal service reform, facilities-based entrants would be forced to compete against monopoly providers that enjoy not only the technical, economic, and marketing advantages of incumbency, but also subsidies that are provided only to the incumbents.[16]

Hargray believes the playing field can be leveled by designating new ETCs and ensuring that they use support to improve networks and drive infrastructure development throughout rural South Carolina. In its pending Application, Hargray has proposed to do just that by investing federal high-cost support in improving coverage and capacity throughout its requested ETC service area. If competition develops as a result, it may be appropriate to lower the regulatory burdens on ILECs to a level consistent with competitive markets.[17]

Hargray disagrees with those who would impose ILEC regulation on competitors, ostensibly to 'level the playing field'. Such arguments are self-serving in that they seek to impose higher compliance barriers on wireless competitors who cannot exert market power, to discourage applications for ETC designation, and raise competitors' costs vis-à-vis other wireless companies, which are not subject to such regulation.

To be clear, Hargray does not oppose higher regulatory burdens in exchange for ETC status – but it does oppose attempts to graft ILEC regulation onto wireless carriers operating in a fiercely competitive marketplace. The *ETC Report and Order* accomplished a compromise that

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[16] *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, First Report and Order*, 11 FCC Rcd 15499, 15506-07 (1996).

[17] The FCC's measured deregulation of AT&T following the break up of the Bell System in 1984 is a good example of how monopoly regulations can be scaled back as competitors take sufficient market share to drive the benefits of competition to consumers.

is competitively neutral as a general matter, and this Commission should follow that model. Recently, the Washington Utilities and Transportation Commission ("WUTC") adopted rules for competitive ETCs that are competitively neutral and targeted to advancing the goals of universal service. We have attached a copy of the WUTC's rules for the Commission's consideration.

V. Imposing a Five-Year Plan is Not the Best Way to Ensure That Support is Used Lawfully.

The *ETC Report and Order* requires carriers who file a petition at the FCC to provide a five-year plan for using support to improve their networks.[18] The new FCC rule does not require a carrier to demonstrate that it will complete construction of its network to reach ubiquitous service within five years. Moreover, the FCC has made clear that market conditions may change the plan along the way and carriers are thus permitted to amend their plans in subsequent years.[19]

Given that wireless carriers in rural areas have very young networks, rapid growth means that business and construction plans change rapidly, sometimes quarter to quarter. The order in which a carrier constructs facilities and the areas within which consumers are demanding service often shifts in response to many market conditions. The amount of support a competitive ETC receives also fluctuates, sometimes significantly. Moreover, the FCC is expected to change the way support is provided to all carriers within the next several months, which may significantly change the level of support flowing to competitors.[20] Thus, any plan beyond 24 months is little more than a guess that is most certain to be amended.

We also note that a publicly filed five-year plan would create expectations that are

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[18] *ETC Report and Order* at para 23.

[19] *Id.* at para. 24; *see also Virginia Cellular, supra,* 19 FCC Rcd at 1571.

[20] *See Public Notice, Federal-State Joint Board on Universal Service Seeks Comment on Certain of the Commission's Rules Relating to High-Cost Universal Service Support,* FCC 04J-2 (rel. Aug. 16, 2004).

unrealistic given the limited planning horizon for network build-out. Some towns will be unhappy that they are listed in year five. Other towns will be unhappy that they were moved down the list as a result of changed market conditions. The simple fact that the level of support cannot be estimated with any degree of reliability more than a year out will saddle carriers and commissioners with a burden of expectations that were never realistic on the date such a plan was filed.

Rather than impose a network improvement reporting requirement with an unrealistic five-year horizon, the Commission should follow the lead of other states that have considered the same issue by adopting a one- or two-year reporting requirement. In Washington, for example, after an rulemaking with extensive public comment on multiple drafts released over a span of several months, the Utilities and Transportation Commission ("UTC") recently adopted rules that require ETC applicants to provide a two-year network improvement plan.[21] In annual certification filings each year, all ETCs in Washington will be required to report on their planned use of support during the following 12 months.[22] Missouri, after a rulemaking proceeding with several rounds of public comment and an administrative hearing, also adopted a two-year network improvement plan requirement for ETC applicants, as did the Oregon Public Utilities Commission this year and the Minnesota Public Utilities Commission last year. The Iowa Utilities Board ("IUB") has also proposed rules that would require, *inter alia,* a two-year network improvement plan. At a hearing concerning the draft rules, the IUB members in attendance circulated a proposal to reduce the planning period to one year. A one or two-year

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[21] Designation and Certification of Eligible Telecommunications Carriers, Order Amending and Adopting Rules Permanently, Docket No. UT-053021 (June 27, 2006). The two-year plan for new applicants is set forth in WAC 480-123-030(1)(d).

[22] WAC 480-123-080.

plan makes sense in view of the fact that the Commission must recertify ETCs each year, giving the Commission ample opportunity to annually review shorter term plans and results from the prior year.

Clearly, this Commission can benefit from the experience of other states that have held hearings and solicited comment from staff, industry participants, and consumer advocates in considering new or modified ETC designation and certification requirements. Missouri and Washington held extensive rulemakings over several months, and as a result adopted rules that incorporated a more thoughtful, workable version of the FCC's network improvement planning requirement. We believe this Commission should follow these examples and require new ETC applicants to provide a two-year plan showing proposed network improvements with the use of high-cost support. In annual reports, all incumbent and competitive ETCs should be required to report the projected amount of support for the following 12 months and the network expenditures proposed during that period with the use of those funds.

VI. A Strict Local Usage Comparability Requirement Would Be Subject to Federal Preemption and Therefore Should Not Be Adopted.

The *ETC Report and Order*'s treatment of local usage appears inconsistent with the statutory prohibition on rate and entry regulation by states. This portion of the *ETC Report and Order* has been appealed and therefore the best course is to avoid unnecessary regulation in an area where there is no demonstrated problem and where there appear to be legal infirmities with the FCC's approach.

An obligation to provide a specified quantity of local usage minutes would amount to impermissible rate regulation because regulation of the amount of local usage is inextricably

intertwined with regulation of rates.[23] For example, if an increase in quantity is mandated, but a rate increase is prohibited, then the unit cost of the product or service has been regulated. Likewise, if an increase in quantity is mandated and the rate is permitted to increase, then the cost to the customer has been increased. In either case, rates have been regulated.[24]

Under federal law, states cannot regulate rates of CMRS carriers, even if the CMRS carrier is an ETC.[25] Rate regulation has been interpreted broadly by the courts[26] and by the FCC.[27] Additionally, the *TOPUC* decision by the Fifth Circuit confirmed that Section 254(f) of the Act — which allows a state to "adopt regulations not inconsistent with the Commission's rules to preserve and advance universal service" — cannot be read to supersede the preemptive

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[23] *See Bastien v. AT&T Wireless Service, Inc.*, 205 F.3d 983, 989 (7th Cir. 2000); *AT&T v. Central Office Telephone, Inc.*, 524 U.S. 214, 223 (1998).

[24] *See Southwestern Bell Mobile System, Inc., Memorandum Opinion and Order*, 14 FCC Rcd 19898, 19907, para. 20 (1999) ("[W]e find that the term 'rates charged' in Section 332(c)(3)(A) may include both *rate levels* and *rate structures* for CMRS and that the states are precluded from regulating either of these.") (emphasis in original).

[25] *See* 47 U.S.C. Section 332(c)(3); *Petition of the State Independent Alliance and the Independent Telecommunications Group for a Declaratory Ruling that the Basic Universal Service Offering Provided by Western Wireless in Kansas is Subject to Regulation as Local Exchange Service*, 17 FCC Rcd 14802, 14820, para. 33 (2002) ("*State Independent Alliance*") ("Kansas is precluded and preempted from imposing rate and entry regulations on Western Wireless' BUS offering, but Kansas may regulate other terms and conditions, and Kansas may impose universal service regulations that are not inconsistent with section 332(c)(3)(A), other provisions of the Act, and the Commission's regulations."). *See also WWC Holding Co., Inc. v Sopkin et al.*, Civ. Action No. 04-cv-01682-RPM, ___ F.Supp. 2d ____, 2006 WL 581161 (D-Colo., Mar. 8, 2006) (concluding that a state commission's conditioning of ETC status on PUC approval of a wireless carrier's rate plans constituted preempted rate regulation).

[26] *See Cellco Partnership v. Hatch*, 431 F.3d 1077 (8th Cir. 2005)(holding Minnesota "Wireless Consumer Protection" Act preempted by 47 U.S.C. § 332(c)(3) as rate regulation); *Bastien, supra*; *Central Office, supra*, ("Rates . . . do not exist in isolation. They have meaning only when one knows the services to which they are attached. Any claim for excessive rates can be couched as a claim for inadequate services and vice versa. If 'discrimination in charges' does not include non-price features, then the carrier could defeat the broad purpose of the statute by the simple expedient of providing an additional benefit at no additional charge . . . An unreasonable 'discrimination in charges,' that is, can come in the form of a lower price for an equivalent service or in the form of an enhanced service for an equivalent price.") (internal quotations omitted).

[27] *See Southwestern Bell Mobile System, Inc., Memorandum Opinion and Order*, 14 FCC Rcd 19898, 19907, para. 20 (1999) ("[W]e find that the term 'rates charged' in Section 332(c)(3)(A) may include both rate levels and rate structures for CMRS and that the states are precluded from regulating either of these.") (emphasis in original).

effect of Section 332(c)(3).[28] In sum, Congress made no "universal service exception" to its preemption of CMRS rate regulation.

The FCC's rules specifically provide that each ETC must offer "an amount of minutes of use of exchange service, ***prescribed by the [FCC]***, provided free of charge to end users." 47 C.F.R. § 54.101(a)(2). On its face, the FCC's rules require ***the FCC*** to prescribe the amount of minutes of exchange service carriers must offer. Thus, the FCC's pronouncement that there is nothing that would prohibit states from imposing such a requirement appears at odds with the statute and its own rules.

As a practical matter, wireless ETCs already offer consumers greater value than do most or all landline carriers. According to a report recently released by the FCC, nationwide the number of mobile subscribers has surpassed the number of landline phones in service.[29] In addition, consumers are arbitraging substantial minutes from ILEC networks to wireless to access wider local calling areas, take advantage of lower long distance rates and to avoid high intra-state toll charges. Moreover, in big cities, where wireless networks are now of higher quality, a significant number of consumers are "cutting the cord" altogether for voice services, retaining a landline phone line for Internet access only. Thus, the better course is to follow the FCC's guidance that as long as an ETC is offering consumers a variety of local usage options, it is meeting its obligation to offer local usage.[30]

Apart from the federal preemption concerns discussed above, a requirement for wireless

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[28] *See TOPUC, supra,* 183 F.3d at 431.

[29] "Local Telephone Competition: Status as of December 31, 2004" (rel. July 8, 2005) (reporting roughly 181.1 million wireless subscribers vs. roughly 177.9 million wireline subscribers). The report can be viewed on the FCC's web site at http://www.fcc.gov/wcb/iatd/comp.html.

[30] *See Virginia Cellular, supra.*

ETCs to offer flat-rate, unlimited service with a calling area identical to the ILEC's would fail the competitive neutrality test. Indeed, competitive neutrality would require the same showing by wireline LECs – that is, that wireline LECs offer at least one rate plan that is comparable to rate plans offered by wireless carriers operating in their service areas. But Hargray does not wish to argue for such a requirement to be imposed on ILECs. Having such a requirement inevitably leads to regulation of minutiae and inefficiencies for all carriers and would be contrary to Congress's "general preference in favor of reliance on market forces rather than regulation."[31]

To fulfill the goals of the 1996 Act, all universal service regulations should promote competition and competitive neutrality. If wireless carriers are permitted to comply with local usage requirements by meeting the *Virginia Cellular* standard, which approved a CETCs offering of a variety of local usage offerings, then consumers will be permitted to decide which service best suits their needs. Since a competitive ETC will only get support if it gets a customer, it has every incentive to position its offerings so that consumers take its service. If a carrier's rates are too high, consumers will choose an alternative if they have one.

By using high-cost support to improve wireless infrastructure, competitive ETCs will continue to drive those additional consumer choices and benefits without the need for the Commission to impose specific rate plan requirements on competitors. There is anecdotal evidence that designation of CETCs in other states has caused ILECs there to amend tariffs to offer wider local calling areas – a marketplace response that was achieved without-regulatory intervention.

VII. Any Equal Access Requirement Should Be Consistent with the FCC's Rule and With Federal Law.

[31] *Petition of N.Y. State Pub. Serv. Comm'n to Extend Rate Regulation, Report and Order,* 10 FCC Rcd 8187, 8190, para. 18 (1995).

Should the Commission adopt the FCC's ETC guideline concerning equal access, any such rule should correspondingly recognize that only the FCC may require a competitive ETC to provide equal access. Before a CMRS carrier can be required to provide equal access, Section 332(c)(8) of the Communications Act of 1934, as amended, requires ***the FCC*** to make a finding that "subscribers . . . are denied access to the provider of telephone toll services of the subscribers' choice, and that such denial is contrary to the public interest, convenience, and necessity[.]" 47 U.S.C. § 332(c)(8). Because states cannot mandate equal access by a wireless carrier, the proper approach is to require carriers to acknowledge that they may be required to offer equal access if all other carriers withdraw from an area. Such an approach recognizes the FCC's role in following the procedures contained in Section 332 for determining whether equal access should be ordered.

We therefore propose bringing the equal access obligation into conformity with the rule adopted in the *ETC Report and Order*, which require an ETC to "certify that the carrier acknowledges that the [FCC] may require it to provide equal access to long distance carriers in the event that no other [ETC] is providing equal access within the service area."

VIII. The Commission Should Adopt the FCC's Service Provisioning Requirements.

Under federal law, all ETCs have the same responsibility – to provide service to all consumers upon reasonable request.[32] Much is made of the fact that ILECs have carrier of last resort ("COLR") obligations, from which the FCC has specifically exempted CETCs.[33] We believe the reason for the exemption is simple. When an ILEC must extend service, it is guaranteed a near-term return on its investment through the high-cost support mechanism. No

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[32] *See South Dakota Preemption Order, supra,* at ¶ 17.

[33] *See First Report and Order, supra,* 12 FCC Rcd at 8856-57.

such opportunity exists for CETCs because they are limited to receiving the per-line support for customers captured by the construction. To cite an extreme example, if a single customer requested service, an ILEC could provide it and recover the costs, and a reasonable profit, through the high-cost mechanism. A CETC, however, would only receive the per-line support for that customer. If the line extension cost was extreme, the CETC would have no hope of recovering its costs.

With respect to wireless ETCs, the FCC and several states have already articulated a workable standard: carriers must provide service upon reasonable request, undertaking a number of specific steps if service cannot be provided immediately, and report annually to the Commission all instances in which it could not provide service.[34] This approach gives the Commission an opportunity to examine potentially difficult requests early and to remain close to the decision-making process for spending high-cost support funds.

IX. Conclusion.

The Commission has properly taken the initiative in seeking public comment on how properly to respond to the *ETC Report and Order*. As the FCC and other states have recognized, there is no need or justification for delaying ETC designations while new rules are under consideration. Around the country, competitive ETCs are using federal high-cost universal service support to upgrade their networks and bring improved service to rural consumers. The public interest is best served by expeditious processing of competitive ETC requests. During the consideration of new rules, this Commission should apply the FCC's permissive guidelines as an interim measure so that qualified carriers can receive federal high-cost support and invest it in their networks without delay.

Most of the guidelines articulated by the FCC would be reasonable with some modifications if applied to all carriers receiving federal universal service support. For example, Hargray recommends that any build-out plan requirement should be limited to a one- or two-year horizon, similar to rules recently adopted in Missouri and Washington and proposed in Iowa. Additionally, the local usage requirement should allow for a variety of rates and calling scopes while avoiding a strict local usage comparability test that would run afoul of federal preemption doctrine. Beyond those requirements, the Commission should use great caution in determining whether to adopt additional consumer protection or service quality criteria applicable to competitors -- especially given that the FCC concluded that wireless carriers may demonstrate their commitment to service quality by adhering to the CTIA Consumer Code. Accordingly, Hargray urges the Commission to consider adopting competitively neutral standards to all ETCs, based largely on the FCC's guidelines as discussed herein.

Respectfully submitted,

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Dated: July 31, 2006

ATTACHMENT

ETC RULES ADOPTED BY WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

Chapter 480-123 WAC

((~~FEDERAL~~)) UNIVERSAL SERVICE ((~~CONTRACTS~~))

NEW SECTION

WAC 480-123-020 Definitions. As used in WAC 480-123-030 through 480-123-080:

"Applicant" means any person applying to an ETC for new service or reconnection of discontinued service.

"Eligible telecommunications carrier" and "ETC" mean a carrier designated by the commission as eligible to receive support from federal universal service mechanisms in exchange for providing services supported by federal universal service mechanisms.

"Facilities" means for the purpose of WAC 480-123-030 (1)(b) any physical components of the telecommunications network that are used in the transmission or routing of the services that are supported by federal universal service mechanisms.

".shp format" means the format used for creating and storing digital maps composed of shape files capable of being opened by the computer application ArcGIS™.

"Service outage" means a significant degradation in the ability of an end user to establish and maintain a channel of voice communications as a result of failure or degradation in the performance of a communications provider's network.

"Substantive" means sufficiently detailed and technically specific to permit the commission to evaluate whether federal universal service support has had, or will have, benefits for customers. For example, information about investments and expenses that will provide, increase, or maintain service quality, signal coverage, or network capacity, and information about the number of customers that benefit, and how they will benefit is sufficient to enable evaluation.

NEW SECTION

WAC 480-123-030 Contents of petition for eligible telecommunications carriers. (1) Petitions for designation as an ETC must contain:

(a) A description of the area or areas for which designation is sought;

(b) A statement that the carrier will offer the services supported by federal universal service support mechanisms throughout the area for which it seeks designation, either using its own facilities or a combination of its own facilities and resale of another carrier's services (including the services offered by another ETC);

(c) A description of how it will provide each supported service;

(d) A substantive plan of the investments to be made with initial federal support during the first two years in which support is received and a substantive description of how those expenditures will benefit customers;

(e) A statement that the carrier will advertise the availability of services supported by federal universal service mechanisms, including advertisement of applicable telephone assistance programs, such as Lifeline, that is reasonably calculated to reach low-income consumers not receiving discounts;

(f) For wireless petitioners, a map in .shp format of proposed service areas (exchanges) with existing and planned locations of cell sites and shading to indicate where the carrier provides and plans to provide commercial mobile radio service signals;

(g) Information that demonstrates its ability to remain functional in emergency situations including a description of how it complies with WAC 480-120-411 or, for a wireless carrier, information that demonstrates it has at least four hours of back up battery power at each cell site, back up generators at each microwave hub, and at least five hours back up battery power and back up generators at each switch; and

(h) Information that demonstrates that it will comply with the applicable consumer protection and service quality standards of chapter 480-120 WAC or, for a wireless carrier, a commitment to comply with the Cellular Telecommunications and Internet Association's (CTIA) Consumer Code for Wireless Service. Information regarding the version of the CTIA code adopted and where to obtain it is set forth in WAC 480-123-999.

(2) A company officer must submit the petition in the manner required by RCW 9A.72.085.

NEW SECTION

WAC 480-123-040 Approval of petitions for eligible telecommunications carriers. The commission will approve a petition for designation as an ETC if the petition meets the requirements of WAC 480-123-030, the designation will advance some or all of the purposes of universal service found in 47 U.S.C. § 254, and the designation is in the public interest.

NEW SECTION

WAC 480-123-050 Revocation of eligible telecommunications carrier designation. Subject to notice and an opportunity to be heard, the commission may decline to grant annual certification, and may revoke, suspend, or modify a designation granted previously if it determines that the ETC has failed to comply with the requirements of section 47 U.S.C. Sec. 214(e)(1) or any other conditions imposed by the commission.

NEW SECTION

WAC 480-123-060 Annual certification of eligible telecommunications carriers. (1) Each ETC seeking certification of the ETC's use of federal high-cost funds pursuant to 47 C.F.R. §§ 54.307, 54.313, or 54.314 must request certification by July 31 each year. The ETC must certify that it will use federal high-cost universal service fund support only for the provision, maintenance, and upgrading of the facilities and services for which the support is intended. The certification must be submitted by a company officer in the manner required by RCW 9A.72.085.

(2) The commission will certify an ETC's use of federal high-cost universal service fund support, pursuant to 47 C.F.R. §§ 54.307, 54.313, or 54.314 only if the ETC complies with the requirements in WAC 480-123-070, and the ETC demonstrates that it will use federal high-cost funds only for the provision,

maintenance, and upgrading of facilities and services for which the support is intended through the requirements of WAC 480-123-080.

NEW SECTION

WAC 480-123-070 Annual certifications and reports. Not later than July 31 of each year, every ETC that receives federal support from any category in the federal high-cost fund must certify or report as described in this section. The certifications and reports are for activity related to Washington state in the period January 1 through December 31 of the previous year. A company officer must submit the certifications in the manner required by RCW 9A.72.085.

(1) **Report on use of federal funds and benefits to customers.**

(a) For an ETC that receives support based only on factors other than the ETC's investment and expenses, the report must provide a substantive description of investments made and expenses paid with support from the federal high-cost fund.

For ETCs that receive any support based on the ETC's investment and expenses, the report must provide a substantive description of investment and expenses, such as the NECA-1 report, the ETC will report as the basis for support from the federal high-cost fund.

(b) Every ETC must provide a substantive description of the benefits to consumers that resulted from the investments and expenses reported pursuant to (a) of this subsection.

(2) **Local service outage report.** ETCs not subject to WAC 480-120-412 and 480-120-439(5) are required to report local service outages pursuant to this subsection. The report must include detailed information on every local service outage thirty minutes or longer in duration experienced by the ETC. The report must include:

(a) The date and time of onset and duration of the outage;

(b) A brief description of the outage and its resolution;

(c) The particular services affected, including whether a public safety answering point (PSAP) was affected;

(d) The geographic areas affected by the outage;

(e) Steps taken to prevent a similar situation in the future; and

(f) The estimated number of customers affected.

(3) **Report on failure to provide service.** ETCs not subject to WAC 480-120-439 are required to report failures to provide service pursuant to this subsection. The report must include

detailed information on the number of requests for service from applicants within its designated service areas that were unfulfilled for the reporting period. The ETC must also describe in detail how it attempted to provide service to those applicants.

(4) **Report on complaints per one thousand handsets or lines.** The report must provide separate totals for the number of complaints that the ETC's customers made to the Federal Communications Commission, or the consumer protection division of the office of the attorney general of Washington. The report must also generally describe the nature of the complaints and outcome of the carrier's efforts to resolve the complaints.

(5) **Certification of compliance with applicable service quality standards.** Certify that it met substantially the applicable service quality standard found in WAC 480-123-030 (1)(h).

(6) **Certification of ability to function in emergency situations.** Certify that it had the ability to function in emergency situations based on continued adherence to the standards found in WAC 480-123-030 (1)(g).

(7) **Advertising certification, including advertisement on Indian reservations.** Certify it has publicized the availability of its applicable telephone assistance programs, such as Lifeline, in a manner reasonably designed to reach those likely to qualify for service, including residents of federally recognized Indian reservations within the ETC's designated service area. Such publicity should include advertisements likely to reach those who are not current customers of the ETC within its designated service area.

NEW SECTION

WAC 480-123-080 Annual plan for universal service support expenditures. (1) Not later than July 31 of each year, every ETC that receives federal support from any category in the federal high-cost fund must report on:

(a) The planned use of federal support related to Washington state that will be received during the period October 1 of the current year through the following September; or

(b) The planned investment and expenses related to Washington state which the ETC expects to use as the basis to request federal support from any category in the federal high-cost fund.

(2) The report must include a substantive plan of the investments and expenditures to be made with federal support and

a substantive description of how those investments and expenditures will benefit customers.

(3) As part of the filing required by this section to be submitted in 2007, and at least once every three years thereafter, a wireless ETC must submit a map in .shp format that shows the general location where it provides commercial mobile radio service signals.

NEW SECTION

WAC 480-123-999 Adoption by reference. In this chapter, the commission adopts by reference all or portions of regulations and standards identified below. They are available for inspection at the commission branch of the Washington state library. The publications, effective dates, references within this chapter, and availability of the resources are as follows:

(1) The Cellular Telecommunications and Internet Association's (CTIA) Consumer Code for Wireless Service.

(2) The commission adopts the version in effect on September 9, 2003.

(3) This publication is referenced in WAC 480-123-020 (contents of petition for eligible telecommunications carriers).

(4) Copies of the CTIA Consumer Code for Wireless Service are available at http://www.ctia.org/wireless_consumers/consumer_code/.

CERTIFICATE OF SERVICE

I, Donna L. Brown, hereby certify that on this 31st day of July, 2006, copies of the foregoing **COMMENTS OF HARGRAY WIRELESS, LLC** was placed in the United States mail, via first class, postage prepaid to:

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